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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-737

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT GENERAL MOTORS CORPORATION IN OPPOSITION

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BRIEF OF RESPONDENT GENERAL MOTORS CORPORATION IN OPPOSITION

Respondent, General Motors Corporation ("General Motors"), through its Counsel, hereby files its Brief in Opposition to the petition for a writ of certiorari filed before this Court by Arkansas Louisiana Gas Company ("Arkla"), to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered on August 21, 1975, in *Arkansas Power & Light Co., et al.* v. *FPC*, 517 F.2d 1223.

QUESTION PRESENTED

Did the Federal Power Commission exceed its authority under Section 4 of the Natural Gas Act by ordering an interstate pipeline to place into effect a plan for the curtailment of natural gas service which might at some time in the future require the pipeline to provide service to one of its customers in a manner inconsistent with the provisions of its contract with that customer?

STATEMENT OF THE CASE

General Motors accepts the Statement set forth by the Petitioner, with the following additions. In Opinion No. 643, the Commission stated that the curtailment plan devised for Arkla is based upon *end use* rather than upon *contract terms.* (Opinion 643, Appendix C at 48a).[1] That is, the Commission sought to curtail gas service to customers of Arkla on the basis of the actual use they make of the gas rather than the terms of their gas purchase contracts. The Commission explained that it felt "impelled" to do so:

> "because contracts do not necessarily serve the public interest requirement of efficient allocation of this wasting resource. In time of shortage, performance of a *firm* contract to deliver gas for an *inferior use,* at the expense of reduced deliveries [under an *interruptible* contract] for *priority uses,* is not compatible with consumer protection." (Opinion 643, Appendix C at 48a) (Emphasis added).

Thus, although contract terms are incorporated in the Commission's curtailment plan so that most "interruptible" contracts are to be curtailed prior to curtail-

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[1] References are to the Appendices to the Petition.

ing most "firm" contracts, some "interruptible" requirements are classified in a priority equal to or higher than some "firm" requirements on the basis of end use.[2] In addition, the Commission established procedures to assure that any customer of Arkla may obtain an exemption from curtailment if it can prove that irreparable injury to life or property may occur because of unusual or special circumstances. (Opinion 643, Appendix C at 48a, 50a).

Although the unusual contract under which Arkla provided service to Mississippi River Transmission Corporation ("MRT") contained language which made Arkla's service to MRT uniquely inferior to all other service on the Arkla system, the Commission held that MRT might seek relief from curtailment by Arkla through the exemption procedure. (Opinion 643, Appendix C at 42a). The Commission did not classify MRT in a particular category of Arkla's curtailment plan. Thus, the Commission did not order Arkla to deliver any particular volume of gas to MRT, but only left open the possibility that it might order Arkla to do so in a future proceeding. Such a proceeding is now under way. On August 26, 1974, an Administrative Law Judge denied MRT's request that Arkla be required to deliver gas to MRT on the basis of the end-use requirements of MRT's customers, and this initial decision is now pending review by the Commission.[3]

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[2] The curtailment plan eventually adopted by the Commission is set out at pages 63a-64a of Appendix D to the Petition. Of course, certain aspects of the curtailment plan, including its reliance upon contract terms, were reversed by the Court of Appeals.

[3] *See* Arkansas Louisiana Gas Co., Docket Nos. RP71-122, RP74-94-1, Initial Decision (Aug. 26, 1974), mimeo at 10-11.

Thus, contrary to Arkla's contention that the orders which are the subject of the Petition "require" Arkla "to deliver natural gas to MRT on the basis of the end uses of gas by MRT's customers" (Petition, p. 7), MRT is not now receiving, and has never received, any gas from Arkla as a result of those orders. Indeed, in the subsequent proceedings at the Federal Power Commission, Arkla has taken the position that the Commission orders at issue herein merely provided that Arkla might be required to make deliveries to MRT if, and only if, a finding is made by the Commission in the future that Arkla's failure to make such deliveries will result in irreparable injury to life or property.[4]

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[4] Thus, on page 16 of its July 26, 1974, Brief to the Administrative Law Judge, Arkla describes the Commission's orders in the following manner:

> "In Opinion Nos. 643 and 643A the Commission made it clear that an interruptible customer, such as MRT, might take appropriate action under the provisions of Paragraph 49 of Opinion No. 643 to procure an exception *where irreparable injury to life or property might occur* because of unusual or special circumstances, to insure that high priority end uses presently served on an interruptible basis are properly protected (Opinion No. 643, paragraphs 29 and 45, mimeo. ed., pp. 11, 17; Opinion No. 643A, paragraph 10, mimeo. ed., p. 4)." (Emphasis in original).

Although General Motors believes that Opinion No. 643B obligated Arkla to make deliveries to MRT based upon the end uses on the MRT system, Arkla continues to dispute this contention, and an Administrative Law Judge has initially decided the issue in favor of Arkla's interpretation. The Commission has not yet resolved the continuing dispute between Arkla and MRT and General Motors concerning the obligation, if any, imposed by the Commission on Arkla to make deliveries to MRT.

ARGUMENT

I. The Question Presented Is Not an Important One.

The question presented by the petition is unique, narrow and does not warrant review by this Court. Petitioner contests the scope of the Commission's authority over the unique terms of a contract of sale between itself and a single customer, MRT. The petition does not raise the broad issue of whether the Commission possesses the general authority to implement curtailments in a manner inconsistent with the terms of contracts; nor does it raise the narrower issue of whether the Commission may modify the terms and conditions of all "interruptible" gas sales contracts in order to implement curtailments based upon end use.[5] It raises instead the extremely narrow issue of whether the Commission may order curtailment of gas service in a manner inconsistent with the terms of one particular "interruptible" contract in the context of a pipeline whose operations "differ markedly from those of the typical natural gas pipeline company regulated by the Commission under the Natural Gas Act." (Petition, p. 3).

Moreover, the precise question presented herein is not whether a customer such as MRT deserves to be placed in a particular curtailment priority or deserves to receive a particular quantity of natural gas, but, rather, whether the Commission has authority to leave

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[5] The Court of Appeals not only rejected Arkla's position with regard to MRT, but also reached the more fundamental conclusion that a curtailment plan which retained any distinction based on contract terms was inconsistent with the Commission's end use policy and was not supported by substantial evidence. (517 F.2d at 1233-1236; Appendix A at 17a-22a). Arkla has not chosen to petition for review of this more general holding.

open the possibility that Arkla may be required at some future time to provide gas service to MRT in a manner inconsistent with the terms of MRT's contract with Arkla. The circumstances in which Arkla might be required to provide such service to MRT and the amount of such service that may be required have not yet been determined by the Commission. These issues are now pending Commission decision in a related proceeding. Thus, the extent of Arkla's disagreement with the Commission cannot even be determined in the present procedural posture of the case. Until the Commission takes further action, this Court cannot determine the nature of the obligation to deliver gas that the Commission will impose, the manner in which this action will alter Arkla's existing obligation under its contract with MRT, or the basis for the Commission's action modifying that obligation.

II. The Decision Below Is Correct.

Assuming for purposes of argument that the issue raised by Arkla has been sufficiently focused to permit consideration of its merits by this Court, General Motors respectfully submits that the resolution of this issue by the United States Court of Appeals for the District of Columbia Circuit is manifestly correct. Moreover, that decision is totally consistent with the decisions of this Court, other decisions of the United States Court of Appeals for the District of Columbia Circuit and the decisions of other United States Courts of Appeals.

A. The Supreme Court Has Held That the Commission Retains Authority Under Section 4 of the Natural Gas Act to Implement Curtailments in a Manner Inconsistent With the Terms of Contracts Subject to Its Jurisdiction.

Arkla contends that the Court of Appeals erred in holding that the Commission has the power to require Arkla to implement curtailments in a manner inconsistent with the provisions of its contract with MRT, but Arkla does not allege that the decision of the Court of Appeals stands alone in this respect. Indeed, Arkla argues that several recent Court of Appeals decisions holding that the Commission may act under Section 4 of the Natural Gas Act to require curtailment in a manner inconsistent with contractual terms are erroneous. (Petition, pp. 9-11). Arkla does not cite a contrary holding by any court, and contends only that this issue has never been resolved by the Supreme Court. Arkla argues that "no question of the scope of the Commission's authority under Section 4 was before this Court in [*FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972)]." (Petition, p. 10).[6]

Contrary to Arkla's claim, in *Louisiana Power* this Court held that the FPC has the authority under Sec-

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[6] A related argument raised by Petitioner is without foundation. Arkla argues that the Commission technically never acted under Section 4(b) in this case because it did not find an "unreasonable difference" in service as required by that section. But the Commission clearly held that "a curtailment plan which would prevent MRT from receiving any gas, even for residential service, while boiler fuel users receive gas is *discriminatory and unjust and unreasonable.*" (Opinion 643A, Appendix D at 59a) (emphasis added). Arkla's contention that MRT is not entitled to any gas service from Arkla would have precisely the result found unlawful by the Commission because MRT would not receive gas from Arkla for any end use.

tion 4 of the Natural Gas Act to order curtailments of gas service in a manner inconsistent with the terms of contracts subject to its jurisdiction. In *Louisiana Power,* the Court was faced with the argument that the Commission acted unlawfully when it permitted a pipeline's new curtailment plan to take effect "despite contrary terms in existing contracts * * *." (406 U.S. at 646). The Court rejected this argument summarily, distinguishing *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation,* 350 U.S. 332 (1956), and quoting with approval the following passage from *United:*

> "Denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest." (406 U.S. at 646).

This view subsequently has been followed consistently by the Courts of Appeals.[7] As the United States Court of Appeals for the District of Columbia Circuit said when presented with the argument that the Commission could not require a pipeline to curtail service in a manner inconsistent with the provisions of various contracts reflecting differing degrees of interruptibility:

> "A short answer to this argument is that the Commission is not bound by agreements among parties subject to its jurisdiction." *American*

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[7] Atlanta Gas Light Co. v. FPC, 476 F.2d 142, 148 (5th Cir. 1973); American Smelting & Refining Co. v. FPC, 494 F.2d 925, 934 (D.C. Cir.), *cert. denied, sub nom.,* Southern California Gas Company v. FPC, 419 U.S. 882 (1974); Michigan Power Co. v. FPC, 494 F.2d 1140, 1144 (D.C. Cir. 1974); State of Louisiana v. FPC, 503 F.2d 844, 858 (5th Cir. 1974); Consolidated Edison Co. v. FPC, 512 F.2d 1332, 1347 n.88 (D.C. Cir. 1975).

Smelting and Refining Co. v. *FPC*, 494 F.2d 925, 934 (D.C. Cir.), *cert. denied, sub nom, Southern California Gas Company* v. *FPC*, 419 U.S. 882 (1974).

B. The Courts Have Uniformly Held That the Commission Need Not Proceed Under Section 7 of the Natural Gas Act When Implementing Curtailments.

Arkla contends that "the scope of the Commission's authority under Section 4 in a curtailment proceeding must be reconciled with the limitations of Section 7." (Petition, p. 12). However, Arkla does not refer the Court to any case holding that the Commission is limited by Section 7 standards when implementing curtailments. Indeed, there can be no such case in view of this Court's clear and unequivocal holding in *Louisiana Power* that the "substantive standard governing FPC evaluation of curtailment plans is found in § 4(b) of the Act." (406 U.S. at 642).[8] In *Louisiana Power*, this Court explicitly rejected Arkla's argument (Petition, pp. 12-13) that the Commission may exercise only a "veto power" over the actions of a pipeline in curtailment cases. Distinguishing *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961), cited by Arkla, the Court held:

> "*Transcontinental* dealt only with FPC 'veto power' under § 7, and in no way limited FPC authority under § 4(b) to prevent discrimination among a pipeline's customers. Since § 4(b) deals with 'service,' the FPC may invoke it to deal with curtailment programs whether or not it could also invoke § 7 for that purpose." (406 U.S. at 646).

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[8] As in the case of Arkla's contract argument, the Courts of Appeals have uniformly followed this Court's holding in *Louisiana Power* that the substantive standards for acting in the curtailment area are those found in Section 4(b) of the Natural Gas Act. See cases cited in note 7, *supra*.

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Whatever option Arkla might have had and foregone under Section 7 at the time the Commission originally granted the certificate under which service to MRT was authorized is irrelevant to the power of the Commission to modify the terms and conditions of that service under Section 4. If the Commission could not make such modifications under Section 4, its only option would be to act on curtailment programs under Section 7—a rigid limitation of the Commission's powers in the curtailment context which was explicitly rejected by this Court in *Louisiana Power*. In short, the decision below was manifestly correct, and review is not required.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondent, General Motors Corporation, respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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